



**Odhambo v Colombia Developers [K] Limited (Cause E147 of 2022)
[2023] KEELRC 217 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 217 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E147 OF 2022
J RIKA, J
JANUARY 31, 2023**

BETWEEN

BENSON BWIRE ODHIAMBO CLAIMANT

AND

COLOMBIA DEVELOPERS [K] LIMITED RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary Objection dated September 29, 2022. It argues that the Claim is time-barred, under Section 90 of the *Employment Act, 2007*.
2. Parties agreed to have the Objection considered and determined on the strength of their Submissions. These were confirmed to have been filed and exchanged at the last mention, on November 10, 2022.
3. The Claimant pleads that he was employed by the Respondent as a Projects Manager, on July 1, 2013, on a monthly salary of Kshs 100,000. He was last paid salary in April 2016. He considers himself still an Employee of the Respondent, over 6 years after he last received a salary from the Respondent, and claims arrears of salary, allowances, leave and statutory contributions, added-up at Kshs 10,607,200, computed from May 2016 until May 2022.
4. He submits that the Objection is not a pure point of law, but relates to disputed facts. The Respondent pleads that the Claimant deserted employment in 2016, while the Claimant states that he is still in employment. There is a continuing default. The Claim is not about termination, but non-payment of salary.
5. The Respondent submits that the Claimant does not contest that the cause of action arose in 2016. The Claim was filed 6 years later, in 2022. The Court is deprived of temporal jurisdiction.



The Court Finds: -

6. There is dispute whether the Claimant deserted employment, or is still in employment. The Preliminary Objection is not a pure point of law. It has to be ascertained if the Claimant deserted, or is still and Employee, entitled to salary and allowances in arrears. He pleads that the Respondent has continued to deny him his salary. He pleads continuous injury. However much unlikely, his claim that he is still in employment after the lapse of over 6 years since he last earned a salary from the Respondent appears, he must be granted a hearing. The cause of action in continuous injury, under Section 90 of the *Employment Act*, arises within 12 months after cessation of the default. The Court does not think that the Claimant can be resolved preliminarily, under section 90 of the *Employment Act, 2007*. There is need to take evidence from the Parties, to establish when the cause of action arose.

IT IS ORDERED: -

- a. Preliminary Objection is declined.
- b. Costs in the cause.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31ST DAY OF JANUARY 2023.

James Rika

Judge

